per month. If he had continued to be a rubber miller his earnings would have been between $175 and $180 per month. There is every likelihood that the plaintiff would continue working at the Museum. I award the sum of $5,000 for loss of future earnings.

Special damage has been agreed at $33.

In the result there will be judgment for the plaintiff in the sum of $10,016 and costs.

Judgment for the plaintiff.

Solicitors: *Murphy & Dunbar; Tan, Rajah & Cheah.*

POH KIM KANG & ORS. v. ISHAK BIN LAMBIK & ANOR.

[O.C.J. (Winslow J.) August 5, 1971]

[Singapore — Originating Summons No. 187 of 1969]

Land Laws — Mortgage — Purchaser mortgaging property to vendor to secure balance of purchase price — Whether a loan — Whether evidence satisfactory.

Moneylenders — Vendor securing balance of purchase price by mortgage — Whether a moneylender — Moneylenders Ordinance, 1959.

On March 14, 1966, the plaintiffs entered into a contract with the first defendant to purchase certain property. The purchase price was $251,379.39, but the first defendant was only able to pay $25,138 being the 10 per cent deposit, plus another $72,871.33. The sum of $160,000 (*sic*) remained outstanding, being the balance of the purchase price. The plaintiffs agreed to take a mortgage of the property from the first defendant for the said sum of $160,000. On June 7, 1966, the plaintiffs conveyed the property to the first defendant, and on the same day, the property was mortgaged by the first defendant to the plaintiffs to secure the sum of $160,000. Interest was paid on the mortgage at $1,600 *per mensem*. It was not disputed on the facts that no money actually passed between the mortgagor and the mortgagee before the execution of the mortgage. The first defendant subsequently executed a deed of trust on August 8, 1966, stating that he was holding the mortgaged property in trust for the second defendants. The trust deed was registered in the Registry of Deeds on June 6, 1967. The plaintiffs by way of originating summons asked the defendants as persons entitled to redeem the equity of redemption in the statutory mortgage to provide certain reliefs affecting monies recoverable under the mortgage which were claimed by the plaintiffs as mortgagees and as persons interested in such relief. On a preliminary objection raised by the second defendants that the mortgage was void because the transaction was one within the meaning of the Moneylenders Ordinance, 1959,

Held: on the evidence before the court there was no loan at all as between the plaintiffs and first defendants. The question whether the plaintiff were carrying on the business of moneylenders cannot arise unless a finding is made by the court that there was a loan in the first instance.

Cases referred to:-

(1) *Robinson's Settlement-Gant* v. *Hobbs* (1912) 28 T.L.R. 298.

(2) *Levy* v. *Dott* (1919) 35 T.L.R. 518.

(3) *Lapin* v. *Abigail* (1930) 44 C.L.R. 166.

(4) *Bull* v. *Simpson* (1915) 15 S.R. (N.S.W.) 365 at p. 370.

(5) *Winter* v. *Lord Anson* [1814-23] All E.R. Rep. 503; 6 L.J.O.S. Ch. 7; 38 E.R. 658.

(6) *Bond* v. *Kent* 23 E.R. 782.

(7) *Temperance Loan Fund Ltd.* v. *Rose* [1932] 2 K.B. 522.

(8) *Eldridge and Morris* v. *Taylor* [1931] 2 K.B. 416.

(9) *Lyle Ltd.* v. *Chappell* [1932] 1 K.B. 691.

(10) *Rabone* v. *Deane & Anor.* (1915) 20 C.L.R. 636.

SUMMONS.

Poh Guan Hock for the plaintiffs.

James Loh for the second defendants.

Cur. Adv. Vult.

Winslow J.: This originating summons came on for hearing before me on 27th February 1970 requiring the defendants as persons entitled to redeem the equity of redemption in statutory mortgage dated 7th June, 1966 (Registered in Volume 1611 No. 32) to provide certain reliefs affecting monies recoverable under the mortgage which were claimed by the plaintiffs as mortgagees and as persons interested in such reliefs.

At the hearing, a preliminary objection was raised by Mr. James Loh, counsel for the second defendants, to the proceedings, on the ground that the said mortgage was void for reason that the said transaction was one within the meaning of the Moneylenders Ordinance 1959.

The undisputed facts are largely set out in Ex. AF and are as follows: —

"1. The plaintiffs before 7.6.1966 were the owners of the property — Conveyance 11.2.1964 — registered in Volume 1507 No. 185.

2. The plaintiffs and the 1st defendant entered into a contract to sell and purchase the mortgaged property on 14.3.1966. Completion date was fixed for 14.4.1966.

3. The price was $251,379.39.

4. The 1st defendant was able to pay $25,138 — 10% deposit and $72,871.33 and was $160,000 short (*sic*).

5. Arrangements were made to get the loan of $160,000 from Seng Giap & Co. Ltd. (registered moneylenders). However, the plaintiffs agreed to take a mortgage of the property from the 1st defendant for $160,000, the balance of the purchase price.

6. The property was conveyed by the plaintiffs to the 1st defendant on 7.6.1966 and on the same day the property was mortgaged by the 1st defendant to the plaintiffs to secure the said $160,000.

7. Interest has been paid from execution of mortgage to 7.3.1967 at $1,600/- *per mensem*.

8. The 1st defendant executed a deed of trust on 8.8.1966 stating that he was holding the mortgaged property in trust for the 2nd defendants. This deed was registered on 5.6.1967."

After being part-heard, further argument on the summons continued on 16th October 1970. At the end of the hearing I reserved judgment as this was the first time that such a novel point had been raised on facts such as these, despite my inclination at the conclusion of the hearing that there was little or no substance in this preliminary point.

It is undoubtedly true that cases like *Robinson's Settlement-Gant* v. *Hobbs*[1] and *Levy* v. *Dott*[2] establish that a loan on mortgage by an unregistered moneylender who carries on business as such is a moneylending transaction by a moneylender within the meaning of relevant legislation like our Moneylenders Ordinance, although certain conflicting views have been expressed in Australia on whether a person lending

money on mortgage is truly a moneylender within the relevant legislation or merely a financier, especially where he takes mortgages as investments and not in the course of the business of lending money with a view to profit (see *Lapin* v. *Abigail*[3] and *Bull* v. *Simpson*[4]). Fine distinctions appear to have been sought to be drawn between persons investing by taking mortgages against loans and persons taking mortgages on loans as a business. To the former class regarded as non-moneylending investors belongs the Sydney solicitor in *Lapin* v. *Abigail, supra,* who was held not to be a moneylender despite his lending a considerable amount of money over two years on a considerable number of loans made otherwise than in the course of his practice as solicitor. As Isaacs J. said, after stating that he had serious difficulty in coming judicially to the same conclusion as the other members of the High Court of Australia who held that the solicitor was not a moneylender: —

"Philanthropy may be safely put aside. For income tax purposes, there is little doubt loans would be set against gains. Investment, having regard to the range of amounts and the absence of any evidence as to long terms, is hardly a legitimate conclusion. What, then, is the proper category? The only method of escape that occurs to me is simply to style Abigail a 'financier', and under that colourless but euphemistic and dignified appellation leave him to lend money systematically at interest and on security very much as a money-lender does, but with susceptibilities saved and immunity preserved."

As *Pannam* in "Law of Money Lenders in Australia and New Zealand" points out at page 44 of his 1965 edition:

"It is of course possible to invest money in loans without becoming a moneylender. But when investment becomes a business then the legislation applies."

I accept the proposition that a loan on mortgage can be a moneylending transaction within our Ordinance provided it is established as a fact that the person lending the money does so as a business.

The question therefore is whether the plaintiffs herein lent $160,000 odd to the first defendant when they took a mortgage of the first defendant's property which had been conveyed to him by them on the same date leaving a balance of $160,000 odd of the purchase money unpaid.

It is not disputed on the facts before me that no money actually passed before the execution of the mortgage and there is authority for holding that even if the mortgage deed in question does acknowledge receipt by the mortgagee of the amount advanced to him this acknowledgment will not be binding if, in fact, no money passed at all, and can be contradicted by evidence to the contrary.

Mr. James Loh for the mortgagor and assignee of the mortgagor, who are the two defendants in the case, did not dispute the fact that no money passed as between the mortgagor and the mortgagees. Mr. Poh Guan Hock, on the other hand, for the mortgagees said, that according to Mr. Loh, the mortgagees were estopped on the ground that the statutory mortgage contained an acknowledgment of receipt for the money advanced. Mr. Poh therefore contended that the mortgagees were not estopped despite what the statutory mortgage says.

In the deed as it now stands the mortgagor acknowledged receipt of the sum of $160,000 odd advanced to him as consideration for the mortgage. If, as he now says through his counsel, no money passed at all, I find it difficult to understand why it should be suggested that the mortgagees are estopped. It is quite clear from the authority of *Winter* v. *Lord Anson*,[5] if authority be needed, that evidence can be let in to contradict what appears on the deed. Here both mortgagor and mortgagees are agreed that no money passed at all and in the absence of any other evidence that money of some kind passed, at least some time prior to the mortgage, it is difficult to understand why it cannot be said that the deed has been contradicted by the statements of counsel on both sides that no money passed at all between them. What the mortgagor acknowledged was actually an unpaid balance of $160,000 odd outstanding under the conveyance. This is far from saying that he obtained a loan.

Mr. Poh Guan Hock, for the mortgagees, dealt with this aspect of the matter, *i.e.* that no money was actually lent and invited me to consider the definitions of "interest", "moneylender" and "principal" in the Ordinance. Essentially, a loan is a payment of money to or for someone on the condition that it will be repaid. The whole question therefore turns on whether there was any loan in this case.

It is quite clear from the authorities cited in *Lightwood* on "Law of Mortgage" at page 524 that the taking of a mortgage for part of the purchase-money and the taking of a note payable on demand for the residue, amongst other circumstances, show an intention to abandon the lien possessed by a vendor. This proposition was upheld in *Bond* v. *Kent*.[6] In the absence of the vendor's lien, all that the plaintiffs herein as mortgagees had was the mortgage deed itself as security and nothing else.

I shall now proceed to deal with the cases relating to circumstances in which, although no money actually passed immediately prior to the signing of the promissory note or some such document, it has been held that the moneylenders legislation applied.

Halsbury's Laws of England (3rd Edition) Vol. 27 at page 31 sets out in a footnote (o) the cases dealing with the expression "money lent", occurring in the English Moneylenders Act of 1927 as it does in our own Moneylenders Ordinance at section 16, relating to the necessity for a note or memorandum in writing of a contract for the repayment by a borrower of money lent. Three of these cases are most pertinent, *viz.*, *Temperance Loan Fund, Ltd.* v. *Rose*,[7] *Eldridge and Morris* v. *Taylor*[8] and *Lyle Ltd.* v. *Chappell*.[9] These cases deal respectively with:

(1) a promise by the borrower to repay the balance of the money previously lent to him;

(2) an agreement substituted for the original agreement for a loan; and

(3) the renewal of a previous loan in the new memorandum;

even though no cash or cheque is handed to the borrower.

I think I only need refer in any detail briefly to the facts in *Lyle Ltd.* v. *Chappell.* In that case an amount of £200 was outstanding on an old loan. The moneylender handed the borrower a cheque for £200 which the borrower indorsed and handed back to the moneylender who treated it as settling the old loan. The borrower then signed a fresh promissory note for £300, the memorandum stating that he had agreed to borrow £200 thereof and that £100 was the interest payable under the terms of the new loan. The memorandum stated "I hereby authorize and request you to allocate the whole of the above advance of £200 in settlement of my promissory note in your favour dated April 25, 1930."

This was the balance outstanding on the old loan; in effect therefore the new promissory note contained a renewal of the amount outstanding on the old loan. Scrutton L.J. stated quite categorically:

"In my opinion, when the time for payment of the original loan has expired without complete repayment, and the time for repayment is extended or altered, there is a fresh loan, and it is sufficient if the memorandum of the altered terms precedes the commencement of the extended period."

It is clear from these cases that although no money actually passed, a loan was held to exist in respect of each of the new promissory notes in respect of the renewal or otherwise of old loans.

It is quite clear from the agreed facts before me that no such situation arises in the summons before me. An amount of $160,000 odd is the balance of the purchase price which the mortgagor was unable to raise. The plaintiffs decided to accommodate him and accordingly took the mortgage in question from him for that amount. It is not as if a sum of $160,000 odd was outstanding in respect of some former loan granted by the plaintiffs to the first defendant, which was being renewed as in the case of *Lyle* v. *Chappell,* under the mortgage.

One must bear in mind that the plaintiffs and the first defendant were vendors and purchaser respectively of the property concerned, in the first instance. Secondly, the mortgagor and the mortgagees were in fact the self-same purchaser and vendors. It is agreed by both sides that no money passed at all or that any such situation such as those mentioned in the cases which I have referred to relating to money lent existed. Had the plaintiffs as vendors not sold their property to the purchaser in the first instance and if all that I had to consider and construe was the statutory mortgage alone then it would be possible for me to hold that the deed on the face of it, acknowledging as it did the receipt of the money advanced, was in fact a loan transaction within the meaning of the two cases I have earlier cited relating to loans on mortgages. *i.e. Robinson's Settlement* and *Levy* v. *Dott.*

The position here, however, is completely different and I can think of no reason why I should hold that the conveyance and the statutory mortgage plus the statement of the undisputed facts before me should cause me any apprehension as to the true nature of the transaction between the parties. The onus of adducing evidence that the true nature of the transaction is something else is upon the mortgagor and his assignees, *i.e.* the first and second defendants. They have not satisfied me that the pith and substance of the transaction viewed as a whole as submitted before me are not the true pith and substance thereof nor have they satisfied me that the documents plus the agreed facts and the other facts adduced by them amount to a mere cloak or device to conceal the true character of the arrangement between the parties. I am not satisfied therefore, on the materials before me that there was any loan at all as between the plaintiffs and the first defendant.

This finding on my part that there was no loan between the parties should dispose of the preliminary point raised by Mr. James Loh in favour of the plaintiffs. I do not therefore have to go any further to consider whether the plaintiffs were carrying on the business of moneylenders. That question cannot arise unless a finding is made that there was a loan in the first instance, that the true character of the arrangement between the parties was one of a loan and not what I have found the arrangement to be. This is what Griffith C.J. found in the case of *Rabone* v. *Deane & Anor.*[10]

I think I can do no better than to cite almost in full from the judgment of Griffith C.J. in this Australian case which is a decision of the High Court of Australia on appeal from the Supreme Court of New South Wales at page 639: —

"The points raised in this case are whether the late Mrs. Neale was carrying on business as a money-lender within the meaning of the Money-lenders and Infants Loans Act 1905, and, if so, whether the transaction in question was one entered into in the course of that business. Mrs. Neale was a lady to whom a very large sum of money — amounting to about £500,000 — was left by her husband, and she desired to invest it. As she was entitled to do so, she preferred to invest it upon mortgages of real estate. Such investments are approved of by the court as investments of trust funds. As there was such a large sum to be invested she followed the practice of her late husband and had an office in Sydney, as her husband had before his death, at which applications for proposed mortgages were received and dealt with. The fact that money was available for investment was also notified by advertisement. She employed the defendant, who was her husband's nephew, to keep her accounts for her. While this was going on, the defendant induced her to buy 30,000 shares in a brick company, in which he was largely interested. That was not the sort of investment to which she had been accustomed, and after a little she repented of it and told her nephew that she wished to get rid of the shares, and suggested that he should buy them. He said that he could not pay for them as he had not the money. She said that she would allow the payment to stand over on security. I do not for a moment believe that she said that she would 'lend' him the money to pay her for them. If she did, it would be the same in substance. The shares remained in her name. Accordingly an agreement was entered into by which he was to purchase the shares, but they were to remain registered in her name. He was to pay her three per cent interest on the upaid purchase money for which she gave him credit for a period of ten years. It is seriously contended that this was a transaction in the ordinary course of a business of a money-lender. It was simply a case of a security taken by an unpaid vendor for the price of goods sold. Mrs. Neale was not satisfied to take the security of the shares alone, but asked for and received security over certain land of the defendant. This makes it all the clearer that the case was one of a security taken by an unpaid vendor. The point is not seriously arguable.

The learned judge said that the transaction seemed to him to be 'far more like that of an unpaid vendor allowing a favoured purchaser to postpone the payment for his shares than that of a money-lender taking security for money lent.'

I should say that it was exactly a transaction of an unpaid vendor allowing a favoured purchaser to postpone the payment on giving security. The transaction, therefore, is clearly not even one made in the course of an investment business. if the word 'business' is properly used in connection with her operations of investment."

With regard to the last sentence it should be remembered that Mrs. Neale had, in *Bull* v. *Simpson, supra,* been earlier held to be carrying on a moneylending business as a moneylender on loans she had made in the course of what she had claimed were "investments" on her part.

The situation is analogous to the case of instalment sale contracts. This matter is dealt with by Mr. Clifford L. Pannam, Senior Lecturer at the University of Melbourne in his "Law of Money Lenders in Australia and New Zealand" which I have referred to earlier. I quote from this book at page 6 as follows: —

"A vendor may agree to sell goods to a purchaser upon terms other than in return for an immediate cash payment. He may, for example, agree to accept payment of the purchase price in weekly or monthly instalments of a fixed amount — even though possession of the goods is to be given to the purchaser immediately. Interest will probably be charged on the outstanding balance. Such an agreement may contain a term that property in the goods is not to pass until the last payment has been made. On the other hand property in the goods may pass immediately to the purchaser. Whatever form the agreement takes there is a deferment in payment for the goods and interest will normally be charged for the privilege of not paying cash. The question arises as to whether these transactions are loans of money. It seems reasonably clear that they are not."

The author then proceeds to deal with *Rabone* v. *Deane.* If I may respectfully add, the clarity and logic of this proposition cannot be assailed, even if it does occur in a book written by a living author on what some people may consider to be a somewhat malodorous subject.

If the summons before me is viewed from the point of view that it involves a case of security taken by an unpaid vendor and nothing more then it cannot be seriously argued that it involves a loan transaction.

Mr. James Loh, for the defendant, seems to have relied strongly on the fact that the plaintiffs were also directors of Seng Giap Ltd., a firm of registered moneylenders and that some of them had individually lent money previously on mortgages to others on one or more scattered transactions not necessarily in the course of the business of moneylending. It seems to me that he misled himself by concluding that the arrangements between the parties amounted to a loan transaction merely because of these matters. As Mr. Poh submitted, the original plan was that the $160,000 odd was to be lent to the first defendant by Seng Giap Ltd. as registered moneylenders. Had that course been pursued this summons would never have arisen. Mr. Poh assured me that the registered moneylenders had insufficient funds and that that is the reason why the plaintiffs themselves collectively as individuals entered into the arrangements in question. If it were necessary for me to do so I would be prepared to hold that even if a firm of registered moneylenders like Seng Giap Ltd. had been the original owners who became vendors of the property in question in the first instance and had genuinely taken a mortgage from the first defendant, as the plaintiffs did, the transaction could not have been held to be a loan transaction and they would not have been caught by the Moneylenders Ordinance for the simple reason that they never lent any money at all. It seems to me to be as simple as that.

I therefore decide the preliminary point in favour of the plaintiffs. The question of costs can, I think, await the disposal of the summons as a whole.

I regret that owing to my ill-health this judgment has been somewhat delayed.

Preliminary point decided in favour of the plaintiff.

Solicitors: *Wee Swee Teow & Co.; Mendis & Loh.*

RE SAN DEVELOPMENT CO.'s APPLICATION

[O.C.J. (Chua J.) September 6, 1971]

[Singapore — Originating Motion No. 19 of 1971]

Administrative Law — Application for certiorari and mandamus — Failure of Commissioner of Appeals, Appeals Board (Land Acquisition) to exercise discretion— Application for appeal out of time — Delay due to fault of solicitors — Land Acquisition Act, 1966, s. 23(3).

This was an application for an order of *certiorari* to quash the order made by the Commissioner of Appeals, Appeals Board, (Land Acquisition) and for an order of *mandamus* directing the said commissioner to hear and determine the appeal of the applicants against the award by the Collector of Land Revenue. The appeal had been made out of time and the appellants had applied for permission to proceed with the appeal notwithstanding that the notice of appeal was not lodged within the time limited. The Commissioner of Appeals dismissed the application holding (*inter alia*) that section 23(3) of the Land Acquisition Act, 1966 which gave the board a discretion to permit any person to proceed with an appeal notwithstanding that the notice of appeal was not lodged within the time limited, did not apply where the solicitor of a party had been negligent.

Held: the commissioner had taken the erroneous view that he had no discretion as section 23(3) of the Land Acquisition Act, 1966 did not apply to any case where the delay was due to the negligence of the solicitor of the intended appellant. The commissioner had a discretion and he had not exercised it. The order of the commissioner will therefore be quashed and an order of *mandamus* will be made directing the commissioner to consider and determine the application of the appellants according to law.

Cases referred to:-

(1) *Gatti* v. *Shoosmith* [1939] 3 All E.R. 916.

(2) *R.* v. *Justices of Kingston* 86 L.T.R. 589.

MOTION.

E. F. N. Gratiaen Q.C. and *Harry L. Wee* for the applicants.

G. S. Hill and *Wu Tchi Chu* for the respondent.

Cur. Adv. Vult.

Chua J.: This is an application by San Development Company (Singapore) Limited (hereinafter referred to as the applicants) for an order of *certiorari* to remove into the High Court and quash the order made on 21st September, 1970, by the Commissioner of Appeals, Appeals Board (Land Acquisition), and also for an order of *mandamus* directing the said commissioner to hear and determine the appeal of the applicants against the award made by the collector of land revenue.